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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ISIDORA LOPEZ-VENEGAS, *et al.*,

Plaintiffs,

v.

RAND BEERS, *et al.*,

Defendants.

No. CV 13-03972-JAK (PLAx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Place: Courtroom 750
Judge: Hon. John A. Kronstadt

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I. INTRODUCTION

This motion addresses the serious harm to families, including American children and their parents, caused by the federal government's unlawful "voluntary departure" procedures. The four plaintiffs seeking this preliminary injunction are the parents of school-age U.S. citizen children.[1] These plaintiffs and their children are suffering clearly "irreparable harm" and this motion seeks only the narrow preliminary remedy of restoring and preserving the status quo ante until a trial on the merits can proceed. In the absence of this limited remedy, the children will be the unwilling and unknowing victims of a much broader dispute over the government's voluntary departure practices. They should not bear the brunt of this wider dispute. A narrow order now, only permitting the parents to return to the United States without interference by the government pending trial on the merits will restore and preserve the status quo, will relieve the children of this burden and is the right thing to do.

As described below and in supporting declarations, the PI Plaintiffs were subjected to a constitutionally suspect "voluntary departure," because they were not informed that by departing the United States they would be legally barred from returning for ten years. Their nuclear families are now separated and their children are suffering emotional distress and seriously degraded performance in school as a result of this separation.

The PI Plaintiffs are highly likely to succeed on the legal question raised in this motion. In light of the early stage of this litigation, the PI Plaintiffs rely at this juncture only on Defendants' failure to disclose that accepting voluntary departure would result in the PI Plaintiffs' banishment from the United States for ten years. The failure to disclose this direct and material consequence of voluntary departure unlawfully deprived the PI Plaintiffs of the ability to make a knowing, informed,

[1] The parents and moving plaintiffs on this motion are Isidora Lopez-Venegas, Gerardo Hernandez-Contreras, Arnulfo Sierra, and Genaro Muñoz-Flores (hereinafter, the "PI Plaintiffs")

and truly consensual waiver of their fundamental right to a hearing to determine whether they could remain in the United States. As a result, their waiver of such a hearing is invalid. As described above, the PI Plaintiffs and their children are suffering ongoing irreparable harm directly caused by the government's deprivation of the PI Plaintiffs' constitutional rights. Further, it is beyond reasonable or serious question that the ongoing harm to the PI Plaintiffs' children tips the balance of equities and public interest in the PI Plaintiffs' favor.

The narrow order sought by this motion only asks that the Court prohibit Defendants from interfering with or preventing the PI Plaintiffs from returning to the United States, or otherwise giving legal effect to their voluntary departure orders, until final resolution of this case. Such an order would place the PI Plaintiffs in the same position they occupied before their unlawful expulsions, allowing the Court to maintain the status quo as it existed before Defendants engaged in the conduct challenged in this suit.

II. STATEMENT OF FACTS

A. The Preliminary Injunction Plaintiffs Were Subject to Voluntary Departure But Not Informed of the Unlawful Presence Bar.

Immigration enforcement agencies use "administrative voluntary departure" —to which the agencies also refer as "voluntary return"—as a summary enforcement tool against non-citizens who are not a high priority for formal "removal proceedings" because they have little or no criminal history. (Dkt. No. 28, ¶ 31.) Defendants' officers summarily expelled each of the PI Plaintiffs from the United States through "voluntary departure" within only hours of detaining them. (Muñoz-Flores Decl., ¶ 10; Sierra Decl., ¶ 12; Hernandez-Contreras Decl., ¶ 9; Lopez-Venegas Decl., ¶ 12.) The PI Plaintiffs would not have accepted voluntary departure had they been informed of one critical fact: anyone who takes voluntary departure after having been unlawfully present in the United States for one year or longer is subsequently "inadmissible" to the United States for ten years.

(Muñoz-Flores Decl., ¶ 11; Sierra Decl., ¶ 13; Hernandez-Contreras Decl., ¶ 10); *see* 8 U.S.C. § 1182(a)(9)(B)(i)(II). Taking voluntary departure after a triggering period of unlawful presence also renders an individual ineligible for an immigrant visa for lawful permanent resident status or any other type of lawful entry into the United States. An individual who takes voluntary departure also loses the opportunity to seek a number of forms of relief against removal under the immigration laws.

There appears to be no factual question that Defendants did not inform the PI Plaintiffs about the ten year bar, whether by specific name or by explaining to the PI Plaintiffs that their presence in the United States without lawful immigration status for more than one year would subject them to it. Information regarding the unlawful presence bar is conspicuously absent from Form I-826, which is used to administer voluntary departure in Southern California. The form advises non-citizens of their "right to a hearing before the Immigration Court" and the prospect of detention pending that hearing unless they are "eligible to be released on bond." (Rivera Decl., Ex. 2 (Form I-826).) The form also states, "In the alternative, you may request to return to your country as soon as possible, without a hearing." (*Id.*) But nowhere does the form disclose the direct consequence of leaving the United States: a ten-year bar to re-entry. Nor did Defendants' officers cure this significant deficiency in Form I-826 by orally informing the PI Plaintiffs of the unlawful presence bar. (Muñoz-Flores Decl., ¶ 11; Sierra Decl., ¶ 13; Hernandez-Contreras Decl., ¶ 10; Lopez-Venegas Decl., ¶ 13.)

Had the PI Plaintiffs appeared before an immigration judge, each would have been eligible for relief from removal and could have sought release on bond while his or her case proceeded through the immigration courts. *See infra* § III.B.1.

Instead, each PI Plaintiff ***unknowingly*** waived his or her fundamental rights, resulting in immediate expulsion from the United States.[2]

B. Defendants' Conduct Is Harming the Preliminary Injunction Plaintiffs and their Families.

Defendants' failure to provide this critical information has come at a high cost to the PI Plaintiffs and their American children.

Gerardo Hernandez-Contreras. Mr. Hernandez-Contreras lived in the United States for more than a decade before an unlawful voluntary departure in November 2012. (Hernandez-Contreras Decl., ¶¶ 2, 6-9.) Mr. Hernandez-Contreras is married to a U.S. citizen and is the father of two U.S. citizen children, C. (age 6) and Je. (age 5). (*Id.* ¶ 3.) Because the children are in school and can live with their mother, Gerardo and his wife decided that the children should stay in the United States, separated from their father. C.'s academic performance has plummeted in her father's absence, and Je. has had difficulty sleeping and eating. (*Id.* ¶ 5.) Had Mr. Hernandez-Contreras appeared before an immigration judge instead of taking voluntary departure, he would have been eligible for cancellation of removal or could have sought to adjust his status through the Provisional Unlawful Presence Waiver.[3] He could have sought release on bond while pursuing those options.

Arnulfo Sierra. Mr. Sierra lived in the United States for more than two decades before an unlawful voluntary departure in August 2013. (Sierra Decl., ¶ 3.) Mr. Sierra and his partner have two U.S. citizen daughters, ages 14 and 10. (*Id.* ¶

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[2] As alleged in the First Amended Complaint, Plaintiffs' voluntary departures were also the result of pressure, misinformation, and/or coercion. However, the Court need not reach this issue or make any finding concerning whether Defendants engaged in such practices to grant this motion. The Court may rely solely on a fact that will be undisputed: that Defendants did not inform the PI Plaintiffs about the ten year bar to re-entry triggered by their voluntary departure.

[3] For information on the Provisional Unlawful Presence Waiver, *see* Plaintiffs' First Amended Complaint (Dkt. No. 28 ¶ 39(d)).

4.) In his case, the family decided the children should remain in the United States. In Mr. Sierra's absence, his older daughter, who attends a special school for high-achieving youth, has received her first-ever failing marks and is in danger of being removed from the school. (*Id.* ¶ 6.) Her younger sister often cries for her father and misses him terribly. (*Id.*) Had Mr. Sierra appeared before an immigration judge instead of taking voluntary departure, he would have been eligible for cancellation of removal and could have sought release on bond while pursuing it.

Genaro Muñoz-Flores. Mr. Muñoz-Flores lived in the United States for more than twenty years before an unlawful voluntary departure in August 2012. (Muñoz-Flores Decl., ¶ 2.) Mr. Muñoz-Flores and his wife are the parents of Jo., their 12-year old son who was born in the United States. (*Id.* ¶ 3.) Jo. had been diagnosed with Attention Deficit Disorder (ADD) before his father was expelled, but he has been deeply affected by the loss of his father's presence in his daily life—he has needed more attention at school, may be placed in special classes, and has had to start taking medication for his condition. (*Id.* ¶ 4.) Had Mr. Muñoz-Flores appeared before an immigration judge instead of taking voluntary departure, he would have been eligible for cancellation of removal and could have sought release on bond while pursuing it.

Isidora Lopez-Venegas. Ms. Lopez-Venegas lived in the United States for more than a decade before an unlawful voluntary departure in August 2011.[4] (Lopez-Venegas Decl., ¶¶ 1, 8-12.) Ms. Lopez-Venegas's twelve-year-old son, F., is a U.S. citizen who suffers from Asperger's Syndrome. (*Id.* ¶ 3.) As a result of Ms. Lopez-Venegas's voluntary departure, F. was effectively forced to move with his mother to Mexico, where he does not have adequate access to treatment or sufficient educational opportunities in light of his condition. F.'s capacity to communicate and engage academically has declined dramatically since his

[4] It appears Ms. Lopez-Venegas did not even sign the I-826 Form that was used to effectuate her "voluntary departure." Rivera Decl., Ex. 2 (Lopez-Venegas I-826 Form).

expulsion. (*Id.* ¶ 14.) Had Ms. Lopez-Venegas appeared before an immigration judge instead of taking voluntary departure, she would have been eligible for cancellation of removal, and could have sought release on bond to remain here with her son while her case proceeded through the immigration courts.

III. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION TO PREVENT FURTHER IRREPARABLE HARM TO THE PRELIMINARY INJUNCTION PLAINTIFFS.

A. A Preliminary Injunction is Warranted.

A district court may grant a preliminary injunction if the moving party establishes: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). This case satisfies each element. The PI Plaintiffs are likely to succeed on the merits and absent a preliminary injunction, they and their families will continue to suffer harm that "cannot be repaired … [or] atoned for." *Jews for J. v. Brodsky*, 993 F. Supp. 282, 311 (D.N.J. 1998). Given the nature of that harm and the public interest and equities in favor of protecting constitutional rights and the development of children, the Court should issue a preliminary injunction restoring the PI Plaintiffs to the position they occupied before their unlawful expulsion from the United States.

B. The Preliminary Injunction Plaintiffs Are Likely to Succeed on Their Claim That Defendants' Failure to Advise Them of the Unlawful Presence Bar Violated the Immigration Laws and the Due Process Clause.

1. The Preliminary Injunction Plaintiffs Had a Right to a Removal Hearing at Which They Could Have Applied for Relief from Removal.

It has been settled for more than a century that non-citizens such as the PI Plaintiffs are entitled to due process before they can be removed from the United

States. Because the PI Plaintiffs lived in the United States and were "subject in all respects to its jurisdiction … although alleged to be illegally here," they could not be removed without "opportunity to be heard upon the questions involving [their] right to be and remain in the United States." *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *see also Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) (citing *Yamataya*); 8 U.S.C. § 1229a (describing procedural protections afforded to individuals in removal proceedings).

The Due Process Clause requires that non-citizens be afforded the opportunity to apply for any relief for which they may be eligible. *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012). At a removal hearing, a non-citizen appears before an immigration judge and has an opportunity to contest the bases for removal and apply for such relief. *See generally* 8 U.S.C. § 1229a(c)(3)(A) (government must prove deportability by clear and convincing evidence); 8 U.S.C. § 1229a(c)(4) (non-citizen may seek relief from removal, carries burden of proof); 8 U.S.C. § 1229b(1) (providing the Attorney General with authority to cancel removal for unlawfully present individuals who have resided here for ten years); 8 U.S.C. § 1255(a) & (i) (permitting adjustment of status by certain individuals not lawfully present).[5] Immigration law also permits individuals without serious criminal histories—like the PI Plaintiffs—to immediately apply to an immigration judge for release on their own recognizance or bond, pending resolution of removal proceedings. *See* 8 U.S.C. § 1226(a).

The PI Plaintiffs unkowingly waived all of these rights when they accepted voluntary departure, thereby losing the opportunity to keep their families intact.

[5] While the law permits certain discrete classes of non-citizens to be removed without removal hearings even if they were arrested within the United States, those authorities do not apply to the PI Plaintiffs. *See, e.g.*, 8 U.S.C. § 1231(a)(5) (permitting reinstatement of prior removal order without second removal hearing for certain individuals who have re-entered in violation of prior removal order).

2. A Non-Citizen's Waiver of the Right to a Removal Hearing Must Be Knowing and Voluntary.

A non-citizen may not waive the fundamental rights identified above unless the waiver is voluntary and knowing.[6] *See, e.g., United States v. Ramos*, 623 F.3d 672, 682–83 (9th Cir. 2010) (because waiver of right to removal hearing must be "knowing and voluntary," "stipulated removal" order process violated due process by failing to provide rigorous waiver procedures); *Gete v. Imm. & Naturalization Servs.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (voluntary and knowing requirement "appl[ies] equally to criminal and to civil cases" including in immigration context). A waiver of constitutional rights is unlawful unless it is "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also, e.g.*, *Dem. Nat'l Comm. v. Rep. Nat'l Comm.*, 673 F.3d 192, 203 (3d Cir. 2012).

That principle applies to acceptance of voluntary departure, which requires a knowing and intelligent waiver of the fundamental right to a removal hearing, that cannot exist without awareness of the direct and material consequences of such waiver. *See, e.g.*, *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) ("Given the consequences of an agreement to accept voluntary departure, such an agreement, like a plea agreement, should be enforced against an alien only when the alien has been informed of, and has knowingly and voluntarily consented to, the terms of the agreement."); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 374 n.27 (C.D. Cal. 1982) ("Voluntary departure in lieu of a deportation hearing is of course permissible but only when the alien voluntarily, knowingly, and intelligently waives the right to a hearing.").

[6] In the First Amended Complaint, the plaintiffs additionally allege that Defendants unlawfully coerced them into accepting voluntary departure. The Court need not address that issue to resolve this motion.

Without awareness of the unlawful presence bar, the PI Plaintiffs could not have knowingly waived their right to a removal hearing. The consequences of voluntary departure after accrual of one year of unlawful presence are similar in severity to the consequences of a removal order issued by an immigration judge. *See, e.g.,* 8 U.S.C. § 1182(a)(9)(A)(ii) (inadmissibility for ten years after removal order). Like individuals formally ordered removed, the PI Plaintiffs incurred a "severe 'penalty,'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (*quoting Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)), that "can be the equivalent of banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947). Like those ordered removed, the PI Plaintiffs "los[t]" much, if not "all that makes life worth living." *Ng Fung Ho. v. White*, 259 U.S. 276, 284 (1922).

The Ninth Circuit has held that the failure to disclose the direct and material consequences of a waiver of fundamental rights can invalidate that waiver in the immigration context. In *Walters v. Reno*, non-citizens had received certain forms from immigration enforcement authorities. 145 F.3d 1032 (9th Cir. 1998). When those non-citizens did not request a hearing after receipt of those forms, the government issued unappealable, final orders of removal against them. *Id.* at 1036. Finding that the forms improperly omitted adequate information as to the legal consequences of forgoing a hearing, the Court held that forms were constitutionally inadequate. *Id.* at 1042–43. "Informing an alien that a final order . . . will result in a finding of deportability and permanent excludability, and in most instances immediate deportation, is necessary in order to ensure that the alien understands that he *must* request a *separate* hearing . . . in order to preserve his rights," the Court explained. *Id.* "Otherwise, the alien has no reason to know that . . . he is waiving his right to a meaningful deportation hearing." *Id.* (citation omitted).

The same principle applies here. Form I-826 does not even allude to the ten-year unlawful presence bar. (Rivera Decl., Ex. 2 (Form I-826).) Nor did the Defendants' officers inform plaintiffs of this crucial fact. Yet this information was

essential for the PI Plaintiffs to make a knowing and intelligent decision about whether to accept voluntary departure—or instead request an immigration hearing. "Otherwise, the [PI Plaintiffs] ha[d] no reason to know that by waiving [their] opportunity for a [removal] hearing" they were also waiving any opportunity to avoid such a harsh penalty. *Walters*, 145 F.3d at 1043. Accordingly, Defendants violated PI Plaintiffs' right to make a knowing and intelligent choice whether to accept voluntary departure or, instead, to appear before an immigration judge to contest removal from the United States.

Under analogous immigration proceedings, the government provides certain advisals to non-citizens—advisals which strongly suggest that, here, the Defendants' failure to warn the PI Plaintiffs about the ten-year bar was unlawful. For example, when immigration authorities ask a non-citizen to waive his removal hearing through the use of a "stipulated" order of removal, those authorities are required to advise the non-citizen of several direct and material consequences. *Ramos*, 623 F.3d at 682–83.[7] Specifically, under a memo issued by the Chief Immigration Judge following *Ramos*, immigration authorities use a standardized motion for waiver of hearing, which contains specific disclosures of the type noticeably lacking in the administrative voluntary departure context (including, for example, explicit warnings that a non-citizen may "not be allowed to return to the United States for 5 or 10 years, or even possibly for 20 years, if ever."). (Rivera Decl., Ex. 1 (O'Leary Memorandum)). The government's failure to provide identical warnings to non-citizens in the administrative voluntary departure context is inexplicable.

The requirement that the PI Plaintiffs could not knowingly agree to waive their rights to contest removal without being informed of the direct and material consequences of their waiver also finds support in both criminal and civil contexts

[7] A stipulated removal is, like administrative voluntary departure, an out-of-court encounter between immigration officers and non-citizens.

outside the immigration law. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 421 (1986) (recognizing that for a waiver to be knowing, at a minimum it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (finding invalid a contractual waiver of due process rights where "[t]he appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights").

In the criminal context, the requirement that plea bargains be knowing and voluntary supports the PI Plaintiffs' position. Courts often equate voluntary departures to plea bargains. *See, e.g.*, *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 973 (9th Cir. 2003); *Ibarra-Flores*, 439 F.3d at 620; *cf. Dada v. Mukasey*, 554 U.S. 1, 11 (2008) (voluntary departure at close of removal proceedings is "a *quid pro quo*" agreement between government and non-citizen). The waiver of fundamental rights inherent in a plea bargain is invalid unless the defendant is advised of "the direct consequences" of his plea. *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). The same is true for voluntary departure, which carries the severe consequence of banishment from the United States for ten years.

The government's obligation to advise an individual of the consequences of the waiver of a right is heightened where, as here, the individual from whom the waiver is elicited is detained.[8] In similar custodial law enforcement contexts, government officers are generally required to supply affirmative notice of rights

[8] None of the PI Plaintiffs had the assistance of counsel in deciding whether to accept voluntary departure. While Form I-826 informs individuals that they may consult with counsel, given that the PI Plaintiffs were in custody, did not have retained counsel, and were not provided a list of legal service providers to contact, they had no ability to consult with counsel before being forced to make a decision. The PI Plaintiffs' inability to consult with counsel, particularly when combined with the Defendants' failure to advise regarding the unlawful presence bar, further establishes that PI Plaintiffs' waivers were not knowing. *Cf. Brady*, 397 U.S. at 748 n.6.

and the consequences of abandoning those rights. *See, e.g.,, Ramos*, 623 F.3d at 682–83 (finding waiver invalid, despite signature on form, because no judge ever questioned detainee to determine whether he understood the "implications" of waiving his right to an attorney). Similarly, *Miranda v. Arizona* requires that warnings must include "the explanation that anything said can and will be used against the individual in court." 384 U.S. 436, 469 (1966). "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id*.

The Ninth Circuit's analysis, and rejection, of a custodial contractual waiver in *Jones v. Tabor*, 648 F.2d 1201, 1203 (9th Cir. 1981) (Kennedy, J.) is particularly instructive. Robert Jones sued the defendants over physical abuse inflicted upon him by jail officials. The Ninth Circuit determined that Mr. Jones' release of claims against the defendants, which he signed while in solitary confinement in return for $500, was an invalid waiver of rights. The Circuit analogized Mr. Jones' purported waiver to releases of liability in maritime law, which "must be predicated on an *unusually strong showing* that the *nature and extent of the seaman's injuries* and the shipowner's potential liability for them *was explained clearly to the seaman* in circumstances where his signing of the release was quite free and intelligent." *Id*. at 1203 (emphases added). The crucial reason for the "particular care" with which the waiver must be examined is "the claimant's *dependence* on potential defendants." *Id*. at 1203-04 (emphasis added).

Here too, the detained PI Plaintiffs were dependent on Defendants' officers to provide them with a clear explanation of the consequences of their waivers, which they did not receive. While the PI Plaintiffs are not at this early point in the case seeking to prove a "coercive atmosphere," as in *Jones*, "[o]bjective factors … such as the presence of an attorney representing the releasing party or the opportunity for [him] to consider the consequences of his actions in a neutral

environment, appear to have been absent." *Id*. at 1204-05.[9] *Jones* thus further supports a finding that, in view of the Defendants' omissions, the PI Plaintiffs did not validly waive their rights.

For all of these reasons, the PI Plaintiffs are likely to prevail on their legal challenge under either the Immigration & Nationality Act's voluntary departure statute or the Due Process Clause of the Fifth Amendment. The voluntary departure statute in plain terms mandates that "departure" under its authority be "voluntary." 8 U.S.C. § 1229c(a). The statute thus implicitly requires a knowing and voluntary decision. *See Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1031 (9th Cir. 2007) ("[W]e may look to the structure and purpose of a statute . . . in determining the plain meaning of its provisions.") (internal quotation marks omitted). Even if the language of the statute were ambiguous, a determination that voluntary departure may be predicated on anything short of a fully-informed decision would raise serious constitutional questions. Construing the statute to require that voluntary departure be "knowing" avoids this outcome. *See Imm. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 304-05 (2001) (construing ambiguous immigration statutes to avoid having to decide serious constitutional question). In the alternative, the Due Process Clause independently requires that voluntary departure be "knowing" and include an advisal of direct and material consequences, for the reasons set forth above. Thus, under either the INA or the Constitution, the PI Plaintiffs' voluntary departures without an advisal of the relevant unlawful presence bars were unlawful.

C. Defendants' Conduct Is Causing Preliminary Injunction Plaintiffs Irreparable Harm.

The PI Plaintiffs are, without question, suffering irreparable harm. Litigating this case to final judgment will take approximately one year, and could take longer

[9] As indicated above, Plaintiffs bring this limited motion on the questions of advisals, but anticipate seeking relief based on coercion at later stages in the case.

considering delays and appeals. During that time, unless the Court issues a preliminary injunction, each PI Plaintiff and his or her family will endure the harms resulting from his or her unlawful expulsion.

1. Deprivation of Constitutional Rights Is Irreparable Harm.

The PI Plaintiffs have been irreparably injured by the significant consequences of Defendants' unlawful conduct. As the Ninth Circuit recently held, "[it] is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *accord Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The PI Plaintiffs have made a strong showing that they were unlawfully deprived of their constitutional right to a removal hearing, along with opportunities to apply for relief from removal and release from detention at that hearing. Nothing more is needed to demonstrate irreparable harm.

2. Separating Parents from Children and Negatively Affecting a Child's Education Are Irreparable Harms.

The PI Plaintiffs and their families are experiencing severe emotional harm as a result of being separated. Defendants' conduct has deprived the PI Plaintiffs from being able to live together with their spouses and children as a family. (*See, e.g.*, Muñoz-Flores Decl., ¶ 12 ("My son and wife and I have not been able to see each other and are suffering under the emotional and financial strain of being separated."); Sierra Decl., ¶ 7 ("I love my family very much and it is very painful for me to be separated from my wife and daughters."); Hernandez-Contreras Decl., ¶ 5 ("My expulsion from the United States has been incredibly difficult for my wife and me, but even more so for our children.").[10]

[10] Ms. Lopez-Venegas is not separated from her disabled son, as she had to bring him with her to Mexico. As explained below, her son has lost access to critical education resources as a result of his relocation to Mexico. This also constitutes irreparable harm.

This parent-child separation is causing irreparable harm to the PI Plaintiffs' children. For instance, Mr. Hernandez-Contreras's U.S. citizen children, C. and Je., have suffered greatly because of Defendants' unlawful conduct. Mr. Hernandez-Contreras is a doting father. In the United States, he picked his children up from school and helped out around the house. (Vasquez Decl., ¶ 5.) Since his expulsion, six-year-old C.'s grades have plummeted. When her teachers ask her why she cannot focus, she answers that she misses her father. C. recently entered a therapy program to help cope with the family's separation. (Hernandez-Contreras Decl., ¶ 5; Vasquez Decl., ¶ 11.) Five-year-old Je. cries frequently and has had trouble eating and sleeping after his father's expulsion. He has told his mother that he does not want to go to school; instead, he wants to travel to Mexico to be reunited with his father. (Hernandez-Contreras Decl., ¶ 5; Vasquez Decl., ¶ 11.)

Mr. Sierra's U.S. citizen daughters have also been grievously injured by their father's expulsion from the United States. Mr. Sierra and his partner worked hard to support their family and to provide a loving and nurturing environment. Mr. Sierra is an attentive father, and he spent much time with his daughters, cooking meals for them and helping them with their schoolwork. (Sierra Decl., ¶ 5.) Before Mr. Sierra's unlawful removal, his fourteen-year-old was a stellar student and attended a special school for high-achieving youth. Since her father's expulsion, however, her grades have plummeted and she has received her first-ever failing marks. (*Id.*, ¶ 6.) Mr. Sierra's ten-year-old daughter cries frequently and misses her father. (*Id.*)

Plaintiff Genaro Muñoz-Flores's twelve-year-old U.S. citizen son, Jo., has been deeply affected by his father's expulsion. When he was young, Jo. was diagnosed with Attention Deficit Disorder (ADD). Rather than relying on medication, however, Mr. Muñoz-Flores and his wife provided Jo. with enough support and care to allow him to manage the disorder. (Muñoz-Flores Decl., ¶ 4.) In this way, Jo. avoided negative side effects of medication for his condition.

Before Mr. Muñoz-Flores' expulsion, he picked his son up from school, helped him with his homework, and took him to the park and on walks, which seemed to help Jo.'s condition. (*Id.*, ¶ 6.) In Mr. Muñoz-Flores' absence, Jo. has needed more attention at school and has started taking medication for his disorder. (*Id.*, ¶ 4.)

Plaintiffs' partners also have suffered, which also impacts the PI Plaintiffs' children. The partners are now essentially single parents, bearing the responsibilities of running a household and caring for children on their own. For example, Mr. Hernandez-Contreras's wife, Aide Vasquez, must work extra hours to provide for the childerens' needs, which takes valuable time away from her children. (Vasquez Decl., ¶ 10.) Similarly, Mr. Muñoz-Flores's wife is struggling without her partner. She does not have access to a car, which makes it difficult to get their son J. to school and doctor's appointments. (Muñoz-Flores Decl. ¶ 6.)

These harms are quintessentially irreparable because they cannot be compensated for with money damages. Accordingly, in applying a standard almost identical to the standard for preliminary injunction in the closely related context of motions for stays of removal,[11] the Ninth Circuit held that claims of "separation from family members, medical needs, and potential economic hardship" are sufficient to demonstrate irreparable harm. *See Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc)).[12] Even the temporary separation of a parent and child constitutes irreparable harm. *See, e.g., Nicholson v. Williams*, 203 F. Supp. 2d 153, 257 (E.D.N.Y. 2002) ("Children and parent-child relationships are particularly vulnerable to delays in repairing custodial rifts. Even relatively short separations

[11] *Abbassi v. Imm. & Naturalization Serv.*, 143 F.3d 513, 514 (9th Cir. 1998).

[12] *Cf. Chalk v. U.S. Dist. Court Cent. Dist. of California,* 840 F.2d 701, 709 (9th Cir. 1988) (irreparable harm arose from teacher's unlawful assignment to administrative position in light of plaintiff's "closeness to his students" and the fact "his participation in their lives is a source of tremendous personal satisfaction and joy to him and of benefit to them").

may hinder parent-child bonding, interfere with a child's ability to relate well to others, deprive the child of the essential loving affection critical to emotional maturity, and interfere substantially with schooling and necessary friendships."). As one district court noted: "It cannot be overstated that permanent loss of the bond with one's child is one of the most extreme harms that a person can suffer and far outweighs any potential harm to defendant from the improvident grant of preliminary relief." *Norman v. Johnson*, 739 F. Supp. 1182, 1191 (N.D. Ill. 1990), *abrogated on other grounds by Suter v. Artist M.*, 503 U.S. 347 (1992).

The effect of the PI Plaintiffs' expulsion on their children's education is a compelling factor supporting a finding of irreparable harm. *See, e.g., L.I.H. ex rel. L.H. v. New York City Bd. of Educ.*, 103 F. Supp. 2d 658, 665 (E.D.N.Y. 2000) ("No level of monetary damages could possibly compensate these students for the educational opportunities they will lose; monetary damages cannot supply the grade promotion lost to a student excluded from the summer school program."); *Emmett v. Kent Sch.Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding that a student missing four days of school was a sufficient showing of irreparable injury). As noted, each of the PI Plaintiffs' children who remained in the United States is starting to suffer academically as a result of their fathers' unlawful expulsion. (*See, e.g.*, Muñoz-Flores Decl., ¶¶ 4,6; Sierra Decl., ¶ 6; Hernandez-Contreras Decl., ¶ 5)

Additionally, Ms. Lopez-Venegas's U.S. citizen son, F., has had to relocate to Mexico to live with his mother, his sole caretaker. (Lopez-Venegas Decl., ¶¶ 8–12.) F., who has a form of autism known as Asperger's Syndrome, received special education instruction, tutoring, and one-on-one therapy in the United States. Before this treatment, he could not communicate well with others or control his emotions. (*Id.* ¶¶5–7.) In Mexico, F. does not have access to any such treatment; he has regressed significantly, experiencing trouble communicating and exercising self-control, and he has been moved back a grade. (*Id.* ¶ 14.) Ms. Lopez-Venegas's

unlawful expulsion has thus effectively deprived a twelve-year-old boy of the special instruction he needs at this formative stage in his life and to which he would be entitled in the United States.

D. The Balance of the Equities Weighs In Favor of an Injunction.

The balance of equities tips sharply in PI Plaintiffs' favor. As explained above, *see supra* § III.C.2, the harm suffered as a result of unlawful expulsion without adequate process is particularly severe for the PI Plaintiffs, their families, and their American children. Expulsion from the United States "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedures by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). While the government has an interest in enforcing the immigration laws generally, the relief sought in this case would not undermine that interest, as the government would be free to pursue removal proceedings against the PI Plaintiffs just as it would have had they elected not to accept voluntary departure. The public has no legitimate interest in enforcing those laws in so unfair a manner as to deny people critical information when they are choosing whether to waive important statutory and constitutional rights.

E. The Public Interest Favors an Injunction.

"The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005); *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights."), *overturned on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc). Thus, the preliminary injunction is in the public interest because core constitutional

rights are at issue. Additionally, the vindication of those core constitutional rights takes on special importance here, because the public has an interest in ensuring the PI Plaintiffs' U.S. citizen children are afforded appropriate access to educational and developmental opportunities. In short, the public interest overwhelmingly favors granting this motion.

IV. CONCLUSION

For the foregoing reasons, the PI Plaintiffs respectfully request this Court grant their Motion for a Preliminary Injunction and enter the concurrently filed Proposed Order enjoining Defendants from giving legal effect to the PI Plaintiffs' unlawful expulsions, and allowing the PI Plaintiffs to return to the United States and seek relief from removal (should Defendants wish to pursue proceedings against them).

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